



[Docket No. FR-6331-N-03]

Request for Information Relating to the Implementation of the Build America, Buy America Act

AGENCY: Office of the Secretary, U.S. Department of Housing and Urban Development (HUD).

ACTION: Notice; Request for Information.

SUMMARY: This Request for Information (RFI) seeks public input on the implementation of the Build America, Buy America Act (“BABA” or “the Act”) as it applies to HUD’s Federal Financial Assistance. In this RFI, HUD is seeking input on several topics relating to the potential information collection burden on recipients, including existing mechanisms for demonstrating compliance with the Act’s domestic content procurement preference (“Buy America Preference,” or “BAP”), potential costs of compliance for recipients and contractors, and the potential impact on projects funded by HUD Federal Financial Assistance.

DATES: Comment Due Date: **INSERT DATE THAT IS 30 DAYS AFTER**

PUBLICATION IN THE FEDERAL REGISTER.

ADDRESSES: Interested persons are invited to provide responses to this RFI. Copies of all comments submitted are available for inspection and downloading at www.regulations.gov. To receive consideration as public comments, comments must be submitted through one of two methods, specified below. All submissions must refer to the above docket number and title.

1. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at www.regulations.gov. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the www.regulations.gov website can be viewed by other

commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

2. Submission of Comments by Mail. Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410-0500.

No Facsimile Comments. Facsimile (FAX) comments will not be accepted.

Public Inspection of Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8:00 a.m. and 5:00 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the submissions must be scheduled by calling the Regulations Division at (202) 708-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Information Relay Service at (800) 877-8339 (this is a toll-free number). Copies of all submissions are available for inspection and downloading at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Joseph Carlile, Senior Advisor, Office of the Secretary, Department of Housing and Urban Development, 451 Seventh Street, SW, Room 10226, Washington, DC 20410-5000, at (202) 402-7082 (this is not a toll-free number. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at 800-877-8339. Questions about this document also be sent to BuildAmericaBuyAmerica@hud.gov.

SUPPLEMENTARY INFORMATION:

I. Build America, Buy America

The Build America, Buy America Act (the Act) was enacted on November 15, 2021, as part of the Infrastructure Investment and Jobs Act (IIJA). Pub. L. 117-58. The Act establishes a domestic content procurement preference, the BAP, for Federal infrastructure programs. Section

70914(a) of the Act establishes that no later than 180 days after the date of enactment, HUD must ensure that none of the funds made available by the Department through a Federal financial assistance program that provides funding for infrastructure projects may be obligated unless it has taken steps to ensure that all of the iron, steel, manufactured products, and construction materials used in a project are produced in the United States. In Section 70912, the Act further defines a project to include “the construction, alteration, maintenance, or repair of infrastructure in the United States” and includes within the definition of infrastructure those items traditionally included along with buildings and real property.

II. HUD’s Progress in Implementation of the Act

A. Initial Report

Since the enactment of the Act, HUD has worked diligently to implement the BAP. Consistent with the requirements of Section 70913 of the Act, HUD has produced a report that identifies and evaluates all of HUD’s Federal Financial Assistance programs with potentially eligible uses of funds that include infrastructure as defined by the Act to determine which programs would be in compliance with the BAP and which would be considered inconsistent with Section 70914 of the Act and thus “deficient” as defined by Section 70913(c) of the Act. The report was submitted to Congress and the Office of Management and Budget (OMB) and published in the Federal Register within 60 days after the date of enactment of the Act, on January 19, 2022 (87 FR 2894). Specifically, HUD published the required report in a notice entitled “Identification of Federal Financial Assistance Infrastructure Programs Subject to the Build America, Buy America Provisions of the Infrastructure Investment and Jobs Act” in compliance with Section 70913. In the report, HUD erred on the side of over-inclusiveness in accordance with Office of Management and Budget (OMB) guidance,¹ finding that none of HUD’s discretionary funding programs reviewed to date fully meet the BAP requirements

¹ See OMB Memorandum M-22-08, Identification of Federal Financial Assistance Infrastructure Programs Subject to the Build America, Buy America Provisions of the Infrastructure Investment and Jobs Act, www.whitehouse.gov/wp-content/uploads/2021/12/M-22-08.pdf.

outlined in Section 70914 of the Act and are considered “deficient” under the definition in Section 70913(c). Since issuing the report, HUD has held regular meetings with Departmental offices and consulted administrative and economic data to plan to implement the Act.

B. OMB Initial Implementation Guidance

On April 18, 2022, OMB issued guidance to heads of Executive Departments and Agencies on the application of a BAP in Federal Financial Assistance programs for infrastructure.² This guidance laid out the current interpretation of the Act and key terminology, how to apply the BAP to Federal Financial Assistance programs for infrastructure, and how agencies should be constructing a transparent waiver process.

The guidance defined “infrastructure” to include public infrastructure projects such as the structures, facilities, and equipment for, in the United States, roads, highways, and bridges; public transportation; dams, ports, harbors, and other maritime facilities; intercity passenger and freight railroads; freight and intermodal facilities; airports; water systems, including drinking water and wastewater systems; electrical transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property. However, infrastructure should be interpreted broadly, and agencies should assess whether a project will serve a public function. “Federal Financial Assistance” is funds that are appropriated or otherwise made available and used for infrastructure by a “non-Federal” entity, which includes States, local governments, territories, Tribes, Tribally Designated Housing Entities, and other Tribal entities, institutions of higher education, and nonprofit organizations, but does not include “for-profit organizations.”

The guidance also clarifies the extent to which disaster, emergency response, or mitigation expenditures are exempt from the Act’s BAP. Pre- and post-disaster expenditures that are “made in anticipation of or response to an event or events that qualify as an ‘emergency’ or ‘major disaster’ within the meaning of the Stafford Act” are not included within the BAP.

² See OMB Memorandum M-22-11, Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure, www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf.

However, “[a]wards made to support the construction or improvement of infrastructure to mitigate the damage that may be caused by a non-imminent future emergency or disaster” are included within the Act’s BAP.

Under the guidance, agencies should consider if an existing domestic content requirement meets the standards in the Act, as the BAP applies to a Federal Financial Assistance program for infrastructure only to the extent that an existing preference does not apply. As a result, policies and provisions that already meet or exceed the Act’s standards should be preserved, while existing requirements that do not meet the Act’s standards must be brought into compliance with the BAP.

The guidance also clarified that the BAP “only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project,” and does not apply if an agency has determined no funds in the project will be used for infrastructure. The BAP “does not apply to tools, equipment, and supplies...brought to the construction site and removed at or before” completion, nor does it apply to equipment and furnishings that are not an “integral part of or permanently affixed to the structure.” Furthermore, items should only be classified as (1) iron or steel, (2) a manufactured product, or (3) a construction material, and agencies should apply the iron and steel test to items that are predominantly iron or steel.

The guidance emphasized that Federal agencies are responsible for processing and approving all waivers, including requests from recipients for their own projects and on behalf of subrecipients. Waivers should generally be targeted to specific products and projects where feasible. Agencies must submit to OMB for coordination when a waiver is a general applicability waiver but should notify OMB before posting a proposed waiver for comment. The agency is responsible for evaluating the proposed waiver to determine its consistency with the Act, and should attempt to maximize the use of goods, products, and materials produced in the United States to the greatest extent possible. Agencies must also develop standard criteria for determining whether to grant a waiver in each circumstance.

The guidance also provided five examples of potential general applicability public interest waivers: (1) de minimis, (2) small grants, (3) minor components, (4) adjustment period, and (5) international trade obligations. These categories are not exclusive, and other public interest waivers may be appropriate. Before a public interest waiver is granted, agencies must assess if a significant portion of any cost advantage of a foreign-sourced product is the result of dumped or injuriously subsidized materials and will integrate any findings from the assessment into the waiver.

The guidance provided a list of information that should be included within each waiver, including the recipient's name and identifier, the funding amount, total cost of infrastructure expenditures, a certification that the Federal official or recipient made a good faith effort to solicit bids for domestic products that fall within the BAP, and a statement justifying the waiver.

OMB also provided initial, nonbinding guidance on the definition of "all manufacturing processes" for construction materials. OMB's guidance clarified the distinction between manufactured product and construction materials, stating that if two of the materials identified by the Act are combined with a third material through a manufacturing process, the product should be treated as manufactured products. For construction materials, agencies should consider "all manufacturing processes" to include at least the "final manufacturing process and the immediately preceding manufacturing stage for the construction material. OMB is seeking additional feedback on this guidance.

Finally, OMB provided a sample award term that would ensure the use of American iron, steel, manufactured products, and construction materials for infrastructure projects complies with the Act's BAP. This sample award term incorporates key definitions and outlines the necessary steps to ensure compliance with the Act. The sample award term includes additional information about the waiver process and could be altered to reflect agency specific procedures.

C. HUD's Public Interest Waivers of the Act's BAP Until the Completion of a Paperwork Reduction Act Package and Tribal Consultation Process

On April 29, 2022 (87 FR 26219), HUD proposed a general applicability waiver of the BAP to HUD's Federal Financial Assistance awards to provide the Department with sufficient time to comply with the requirements of the Paperwork Reduction Act (PRA). HUD outlined the need to impose additional information collection requirements on recipients of HUD Federal Financial Assistance to ensure full compliance with the BAP. HUD stated that recipients of Federal Financial Assistance from HUD are unfamiliar with the BAP and additional information collection requirements, as HUD's programs have not previously been subject to a similar Buy American preference. As a result, HUD found that the proposed general applicability waiver of the BAP until HUD had the opportunity to fully review public comments on how to effectively reduce the burden on the public arising from information collection necessary to implement the Act would be in the public interest.

In addition, on April 29, 2022 (87 FR 26221), HUD proposed a general applicability waiver of the BAP to HUD's Federal Financial Assistance awards for Tribes, Tribally Designated Housing Entities (TDHEs), and other Tribal Entities to provide the Department with sufficient time to comply with HUD's Tribal consultation process. HUD's Tribal Government-to-Government Consultation Policy³ was adopted in compliance with Executive Order 13175, "Consultation with Indian Tribal Governments," and outlines the internal procedures and principles HUD must follow when communicating and coordinating on HUD programs and activities that affect Native American Tribes. Given that the BAP is new to HUD's Federal Financial Assistance directed to Tribes, TDHEs, and other Tribal Entities and the potential impact of the BAP on Tribal recipients, HUD found a general applicability waiver was in the public interest to ensure HUD has sufficient time to complete the Tribal consultation process in recognition of Tribe's right to self-government and inform a tailored implementation for Tribal recipients.

³ www.hud.gov/program_offices/public_indian_housing/ih/regs/govtogov_tcp. See also 81 FR 40893.

More information about HUD's proposed waivers is available here:

www.hud.gov/program_offices/general_counsel/BABA.

III. Request for Information

HUD is requesting input from interested parties on the potential documentation and information collection necessary to estimate the information collection burden and assist HUD in the development of the PRA package. As discussed above and in HUD's prior notices regarding the implementation of the Act, because the BAP is new to HUD's programs and Federal Financial Assistance, HUD currently does not have sufficient data about the compliance and monitoring burden on recipients required to implement the BAP. As a result, input is necessary to create a meaningful estimate of the information collection burden in compliance with the PRA.

1. What HUD Federal Financial Assistance is used to fund infrastructure as defined under the Build America, Buy America Act? Specifically, HUD is seeking input from recipients on what forms of HUD's Federal Financial Assistance are used to fund infrastructure projects in those programs identified in HUD's report to Congress and OMB on January 19, 2022 (87 FR 2894) or in any other program through which HUD's Federal Financial Assistance may be used to fund infrastructure projects.
2. How can HUD document what projects serve a "public function," thus qualifying as infrastructure under OMB's guidance and falling within the scope of the Act? When determining if a program has infrastructure expenditures, OMB guidance indicates that Federal agencies should interpret the term "infrastructure" broadly and consider the definition provided as illustrative and not exhaustive. Agencies are advised to consider whether the project will serve a public function, including whether the project is publicly owned and operated, privately operated on behalf of the public, or is a place of public accommodation, as opposed to a project that is privately owned and not open to the public. Projects with the former qualities have greater indicia of

- infrastructure, while projects with the latter quality have fewer. How should HUD consider infrastructure projects more broadly? How can HUD determine if the ultimate recipient of the funding is a covered non-Federal entity?
3. Are the entities utilizing Federal Financial Assistance to fund infrastructure doing so independently or in partnership with other entities? If used in partnership with other entities, how often are these private entities or other individuals that would not be covered by the definition of non-federal entities under 2 CFR 200.1?
 4. What activities are undertaken by recipients of HUD Federal Financial Assistance that fall within the Act's BAP? To the extent that these infrastructure projects are disaster-related, can the projects be clearly defined as undertaken in response to either (1) non-imminent future emergency or disaster mitigation/preparedness or (2) disaster or emergency response/imminent threats? How often would projects be designed to address both long term and imminent threats? How often would projects be designed to address current recovery needs along with future long term mitigation needs? What portions of infrastructure projects involve the use of iron, steel, manufactured products, or construction materials? How do recipients currently differentiate between infrastructure spending and non-infrastructure spending, such as administrative costs? What types of mitigation activities are conducted utilizing HUD Federal Financial Assistance that are not related to an imminent threat of a future emergency or disaster? How, if at all, will activities be limited such as funding fewer projects?
 5. How do recipients currently determine sourcing for materials? Are there existing mechanisms to locate American made iron, steel, manufactured products, or construction materials? Furthermore, how do recipients currently track contractor sourcing? How often are materials recycled from other products such that the origin of such materials may be unknown?

6. Are recipients currently subjected to Buy American requirements from other Federal, state, local, or Tribal entities? If yes, are there any existing de minimus thresholds exceptions in place and what are those exceptions? If yes, how have recipients ensured compliance with these preferences? What steps have Federal, state, local, or Tribal entities taken to ensure compliance? What type of contractual language has been utilized to ensure compliance? If contractual language has been utilized to ensure compliance with a Buy American requirement, when was it first added? Is the suggested language in Appendix I of OMB's "Memorandum for Heads of Executive Departments and Agencies"⁴ issued April 18, 2022, consistent with other Buy American language in award terms? Are there ways to improve this suggested award language for HUD's Federal Financial Assistance programs? What is the burden and impact, either based in prior experience or as an estimate based on OMB's suggested language, associated with inserting Buy American language into contracts for infrastructure projects?
7. Are there any plans in the iron, steel, manufactured products, or construction materials industries to provide documentation regarding materials' compliance with BABA? Are there existing forms of documentation that would demonstrate BABA compliance? How, if at all, will BABA compliance impact energy efficiency efforts pursuant to Executive Order 14008?
8. What are contractor's administrative costs associated with complying with BABA? What forms of maintenance and guarantee costs will be necessary to confirm compliance? Will there be any construction timeline delays associated with BABA compliance? Is there a need for standard contractual provisions to deal with potential delays arising from BABA compliance? If there is a need for a product specific waiver, when would contractors know about the need?

⁴ www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf.

9. What, if any, are the specific concerns, either from recipients or contractors, about a potential waiver process? Considering agency requirements associated with waiver processing, what would be the ideal and realistic timeline for waiver processing that would minimize impact on affected projects? What documentation is currently available, either from contractors or recipients, to demonstrate the need for a waiver in line with the requirements in section 70914 of the Act?
10. Where applicable, how will BABA requirements affect relocation plans, transfer procedures, and/or reasonable accommodation or modifications procedures for existing occupants? What if any changes are required for your agency's Administrative Plan or Admissions and Continued Occupancy Plan? Are there any other potential impacts on current residents of projects supported by HUD Federal Financial Assistance?
11. What situations would require expedited or general waivers? How can HUD develop its waiver criteria in a way that identifies these expedited or general waivers? Are there situations where the cost of the materials would always meet the standards for waivers established under Section 70914 of the Act, whether a cost, public interest, or nonavailability waiver?
12. How, if at all, would the Act's BAP affect contractor's willingness to accept infrastructure contracts subject to BABA's requirements? How would contractors need to build in additional costs when bidding for infrastructure contracts?

Marcia L. Fudge,
Secretary.

